BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE: Application of Dominion Energy South Carolina, Incorporated for Adjustment of Rates and Charges	)	**DESC's Return to Motion for Partial Summary Judgment Regarding Proposed Amendments to Section V of DESC's General Terms and Conditions**

Dominion Energy South Carolina, Inc. ("DESC" or the "Company") files this return to the motion for partial summary judgment filed by the South Carolina Office of Regulatory Staff ("ORS"). The Company timely files this return pursuant to S.C. Code Ann. Reg. 103-829. ORS claims that the Company seeks to limit liability for its own negligence and require customers to indemnify the Company for such negligent acts. This argument lacks merit. The proposed revisions to Section V of the Company's General Terms and Conditions do not and were not intended to limit the Company's liability for its own negligence. Thus, the proposed revisions comply with South Carolina law. Moreover, the decision as to whether the Commission would adopt the proposed revisions is a quintessential factual policy question not appropriate for summary judgment.

Summary judgment is inappropriate, and the Commission should deny the motion for partial summary judgment. In the alternative, to the extent that the Commission believes clarification of the proposed revision is necessary, the Company is willing to submit a second set of proposed revisions to Section V of the Company's Terms and Conditions that will confirm that it does not seek to limit liability for its negligence in the revisions to the General Terms and Conditions.

Applicable Standard

"Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Summary judgment can be granted only when it is perfectly clear that no genuine issue of material fact is involved and inquiry into the facts is not desirable to clarify application of the law. Hudson v. Zenith Engraving Co. Inc., 273 S.C. 766, 771, 259 S.E.2d 812, 814 (1979). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Tupper, 326 S.C. at 325, 487 S.E.2d at 191.

All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. True v. Monteith, 327 S.C. 116, 117, 489 S.E.2d 615, 616 (1997). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545.

Argument

ORS claims that the Company's proposed revisions to Section V of the General Terms and Conditions violate public policy because the Company attempts to limit liability for its own negligence and seeks indemnification from customers in overhead line incidents. See Motion p. 2-3. Both positions lack merit. The Company's revisions comply with South Carolina law and align with the public policy of the majority of States.

First, ORS incorrectly states that the Company seeks to limit liability for its negligence as is evident from the plain and unambiguous language in Section V. ORS's claim ignores the plain language of the proposed revisions. ORS's position conflicts with the well-established rules applicable to interpretation of contract language.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. Schulmeyer, 353 S.C. at 495, 579 S.E.2d at 134.

A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Id. Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Park Regency, LLC v. R & D Dev. of the Carolinas, LLC, 402 S.C. 401, 412-13, 741 S.E.2d 528, 534 (Ct. App. 2012); accord Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (stating the court must interpret contractual language in its natural and ordinary sense).

The plain and unambiguous language in the revisions establishes that the Company did not attempt to limit its liability. The General Terms and Conditions, as revised, provide:

V. COMPANY'S LIABILITY

A. General

The Company shall not be in any way responsible or liable for damages to or injuries sustained by the Customer or others, or by the equipment of the Customer or others by reason of **the condition or character of Customer's wiring and equipment, or the wiring and equipment of others on the Customer's Premises**. The Customer agrees to **maintain his, her or its machinery, lines, equipment, apparatus and/or appliances in a safe condition** and shall indemnify and hold harmless the Company from any claim or loss, including attorney's fees and court costs, arising out of any property damage, business loss

or interruption, and/or personal injuries resulting from or which may be in any way **caused by the operation and maintenance of the Customer's machinery, lines, equipment, apparatus and/or appliances**. The Company will not be responsible for the use, care, or handling of electricity delivered to the Customer **after it passes the service point**, and shall not be liable for any damages on account of injuries to person or property resulting in any manner from the receiving, use or application by the customer of such electrical energy. The Customer assumes responsibility and liability for damages and injuries caused by failures or malfunctions **of Customer's machinery, lines, equipment, apparatus and/or appliances**.

B. Weather; Defects

The Company shall not be in any way responsible or liable for damages to or for injuries sustained by the Customer or others, or to Customer's machinery, lines, equipment, apparatus, appliances, and/or other property where such injury or damage is any way caused by weather, storm, lightning or by defects in or failure of the machinery, lines, equipment, apparatus, appliances and/or other property.

C. Overhead Contact

The Company shall not be in any way responsible or liable for damages to or injuries sustained by the Customer or others, or by the machinery, lines, equipment, apparatus, appliances, and/or other property of the Customer or others, resulting from any work or activity conducted by **Customer or Customer's household member, employee, reasonably foreseeable trespasser, invitee, agent, builder, contractor, or subcontractor** within ten (10) feet of any of Company's overhead lines. The Customer shall indemnify and hold harmless the Company from any claim or loss, including attorney's fees and court costs, arising out of any overhead high voltage contact where the Customer has actual or constructive notice of such work or activity.

Section V, Terms & Conditions, Exhibit B to the Company's Application (emphasis added).

As is evident from the emphasized language, the Company did not attempt to limit liability for its actions. Rather, the revisions only address situations involving damages to or injuries resulting from customer actions, equipment and wiring within customer control, or equipment or wiring of third-parties other than the Company or the customer. The revisions also keep in place[1] the language addressing the "use, care, or handling of electricity delivered to the Customer after it

[1] ORS claims that other utilities limit liability to damages or injuries on the customer's side of the "point of delivery." See Motion p. 6. The proposed revisions in this matter maintain that proposition. Again, the revisions merely clarify customer responsibility for injuries or damages caused by the customer, customer equipment/wiring, or actions of third-parties. Moreover, the proposed revisions keep in place "point of delivery" language used in the current version of Section V of the General Terms and Conditions.

passes the service point." Nothing in the revised language addresses damages to or injuries resulting from actions of the Company.

The Company is proposing these revisions to clarify customer responsibility for injuries or damages arising from customer or third-party actions. The current language in Section V of the General Terms and Conditions has caused confusion with customers and needs clarification to clearly articulate customer responsibility independent of the actions of the Company. As noted in direct testimony, the purpose of this revision was to:

> [A]dd language related to customer equipment, weather-related damage, and customer behavior that communicates to customers in a more understandable fashion the Company's responsibilities with respect to loss of service.

See Direct Testimony of Allen W. Rooks p. 21. Nothing in the proposed revisions substantively alters the relationship between the Company and the customer despite the unsubstantiated claims of ORS.

The proposed revisions do not disclaim or limit Company liability for its own negligence. The language merely offers additional language to assist the customer in understanding where Company responsibility ends and customer responsibility begins.[2] Therefore, the proposed revisions to Section V of the General Terms and Conditions do not violate the public policy of South Carolina. The motion should be denied.

ORS also claims that the proposed revisions improperly require the customer to indemnify the Company in situations of overhead high voltage contact. See Motion p. 3. This argument also incorrectly construes the language in the proposed revisions. The indemnification language again applies only to damages or injuries arising from or caused by the customer, customer

[2] To the extent that the Commission believes clarification of the proposed revision is necessary, the Company is willing to submit a second proposed revision to Section V of the General Terms and Conditions that will confirm that it does not seek to limit liability for its negligence in the revisions to the General Terms and Conditions.

equipment/wiring, or actions of third-parties in contact with overhead high voltage lines. The language does not require or even suggest that the customer would indemnify the Company from its own negligence. ORS tries to avoid the plain language of the proposed revisions by alleging that the indemnification is broad enough to cause the customer to indemnify "regardless of whether the Company was at fault in causing the damage or injury." See Motion p. 3. This argument has been rejected by our courts.

In Federal Pacific Electric v. Carolina Production Enterprises, the court addressed an argument that an indemnification provision was broad enough to require the defendant customer to indemnify the plaintiff company for the plaintiff's "own negligence." 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59. The court refused to expand the reach of the indemnity provision. The court held that while the indemnity provision was broad it did "not disclose an intention to indemnify for consequences arising from Federal Pacific's own negligence." Id. 298 S.C. at 29, 378 S.E.2d at 59. The court so held because "the indemnity provision relates only to Carolina Production's [actions]" and did not related to an "act of negligence of Federal Pacific." Id.

This matter is analogous. The indemnity language in Section V of the General Terms and Conditions only addresses actions by the customer or a third-party. It cannot be read to include an act of negligence by the Company. Therefore, the indemnity provision cannot violate the public policy of South Carolina. ORS's argument fails as a matter of law and should be rejected by the Commission.

ORS wants the Company to assume all liability regardless of who causes the damage or injury by interacting with the overhead high voltage lines. That is not the law. The Company is not required to assume liability when injury or damage results from actions of a customer or another person. Our Supreme Court has recognized that an electric utility can disclaim liability

for the actions of others because the Company is not required to assume all risk of injury or damage regardless of source. See Foreman v. Atlantic Land Corp., 271 S.C. 130, 133-134, 245 S.E.2d 609, 611 (1978) ("We think that the law does not require a person who maintains a high-voltage electric wire . . . to anticipate at his peril every possible circumstance under which some person might make contact with this wire") (internal citations omitted). As our Supreme Court holds "the law does not require a person who maintains a high-voltage electric wire . . . to anticipate at his peril every possible circumstance under which some person might make contact with this wire." Id.

The United States Court of Appeals for the Fourth Circuit has likewise come to a similar conclusion. That court held that an electric utility is not required to design overhead high voltage lines to anticipate unforeseeable, illegal, or impermissible actions within proximity of the lines. The court recognized that the electric utility should not be responsible for damages or injuries resulting from the actions of others in proximity to the line. The court noted:

> The power line was constructed and maintained in accordance with the requirements of the State. The power Company had no knowledge, information or reason to believe that employees of the brick yard would move a crane under their transmission line and raise this boom without bothering to look to see where they were working or what would be the result. This terrible and tragic accident came about as a result of negligence on the part of the brick yard employees.

Burns v. Carolina Power & Light Co., 193 F.2d 525, 528-529 (4th Cir. 1951).

The Company builds the overhead high voltage lines in compliance with National Electric Safety Code guidelines. That evidences the Company's due care in placing these lines. Foreman, 271 S.C. at 132, 245 S.E.2d at 610 ("While this [the National Electric Safety Code] has no legislative sanction, it is difficult to conceive a better test of care than compliance with its provisions").

The Company seeks no more than what the law allows—it should not be responsible for damages or injuries resulting from the actions of others in proximity to the Company's overhead high voltage lines. This is entirely consistent with the fact that South Carolina imposes a duty on the utility to protect only those customers or third-parties who are "rightfully in proximity to [the lines], and who are guilty of no wrong" and are "without negligence on their part. Hill v. Carolina Power & Light Co., 204 S.C. 83, 95-96, 28 S.E.2d 545, 549 (1943); Elliott v. Black River Electric Cooperative, 233 S.C. 233, 253, 104 S.E.2d 357, 367 (1958).[3]

ORS's argument contradicts these settled principles and seeks to impose strict liability on the Company. The Commission should adhere to precedent and deny the motion for summary judgment.

Conclusion

Based on the foregoing, the Commission should deny the motion for partial summary judgment because the current proposed revisions to Section V of the General Terms and Conditions comply with South Carolina law. In the alternative, the Commission should deny the motion to allow DESC to submit the second proposed revisions to Section V of the General Terms and Conditions to clarify the language used in Section V to eliminate confusion on this issue.

{Signature Page Follows}

[3] Untrained employees cannot be in "rightful proximity" and are "guilty of a wrong" if they come within 10 feet of an energized line. OSHA 1926.1408. If an employee not trained to work on an overhead high voltage line cannot be within that distance from an overhead high voltage line then certainly an untrained customer should be subject to the same restriction for the customer's safety.

Respectfully submitted,

s/ Michael J. Anzelmo
Michael Anzelmo
McGuireWoods LLP
1301 Gervais Street, Suite 1050
Columbia, SC 29201
(803) 251-2313
manzelmo@mcguirewoods.com

K. Chad Burgess
Matthew W. Gissendanner
Dominion Energy South Carolina, Inc.
Mail Code C222
220 Operation Way
Cayce, SC 29033
(803) 217-8141
kenneth.burgess@dominionenergy.com
matthew.gissendanner@ dominionenergy.com

Mitchell Willoughby
Willoughby & Hoefer, P.A.
P.O. Box 8416
Columbia, SC 29202
(803) 252-3300
mwilloughby@willoughbyhoefer.com

Belton T. Zeigler
Kathryn S. Mansfield
Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504
belton.zeigler@wbd-us.com
Kathryn.mansfield@wbd-us.com

November 25, 2020

Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2020-125-E

IN RE: Application of Dominion Energy South Carolina, Incorporated for Adjustment of Rates and Charges	)	**CERTIFICATE OF SERVICE**

This is to certify that I, Michael J. Anzelmo, have served this date one (1) copy of DESC's **Return to the Motion for Partial Summary Judgment** in the above-referenced matter to the person(s) named below by causing said copy to be electronically mailed, addressed as shown below:

Andrew M. Bateman, Esquire
Christopher M. Huber, Esquire
Alexander W. Knowles, Esquire
Steven W. Hamm, Esquire
OFFICE OF REGULATORY STAFF
E-mail: abateman@ors.sc.gov
E-mail: chuber@ors.sc.gov
E-mail: aknowles@ors.sc.gov
E-mail: shamm@ors.sc.gov

Robert Guild, Esquire
bguild@mindspring.com

Roger P. Hall, Esquire
Carri Grube-Lybarker, Esquire
Connor J. Parker, Esquire
S.C. Department of Consumer Affairs
rhall@scconsumer.gov
clybarker@scconsumer.gov
cjparker@scconsumer.gov

Dorothy E. Jaffe, Esquire
Sierra Club
dori.jaffe@sierraclub.org

Frank Knapp, Jr.
fknapp@knappagency.com

Katherine Nicole Lee, Esquire
Southern Environmental Law Center
klee@selcsc.org

John B. Coffman, Esquire
Adam Protheroe, Esquire
S.C. Appleseed Legal Justice Center
john@johncoffman.net
adam@scjustice.org

Stephanie U. Easton, Esquire
Spilman Thomas & Battle, PLLC
seaton@spilmanlaw.com

Scott Elliott, Esquire Elliott & Elliott, P.A.
selliott@elliottlaw.us

Emily W. Medlyn, Esquire
U.S. Army Legal Services Agency -
Regulatory Law
emily.w.medlyn.civ@mail.mil

Alexander G. Shissias, Esquire
The Shissias Law Firm, LLC
alex@shissiaslawfirm.com

Derrick Price Williamson, Esquire Spilman
Thomas & Battle, PLLC
dwilliamson@spilmanlaw.com

s/ Michael J. Anzelmo
Michael J. Anzelmo

November 25, 2020

Columbia, South Carolina